Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-718

MARGARET TOWNSEND,

Petitioner,

—against—

NASSAU COUNTY MEDICAL CENTER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Margaret Townsend, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 30, 1977.

Opinions Below

The opinion of the district court, which is not reported, is set out in the appendix, pp. 1a-18a. The order of the court of appeals vacating the district court judgment and remanding for reconsideration, which is not reported, is set out in the appendix, pp. 19a-20a. The judgment of the district court confirming its original judgment, which is not reported, is set out in the appendix, pp. 21a-22a. The

opinion of the court of appeals, which is reported at 558 F.2d 117, is set out in the appendix, pp. 23a-34a. The order of the court of appeals denying rehearing, which is not yet reported, is set out in the appendix, pp. 35a-36a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 30, 1977. A timely petition for rehearing was denied on August 24, 1977 and this petition for Certiorari was filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Was the June 30, 1977, decision of the Court of Appeals, holding that evidence that a job requirement excluded 94% of the black adult population was irrelevant to Title VII, clearly erroneous and in conflict with the decision of this Court on June 27, 1977, upholding such evidence as sufficient to demonstrate discriminatory effect under Title VII, *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 27, 1977)?

2. Did the respondents act arbitrarily and capriciously, in violation of due process of law, or contrary to equal protection of the law when they dismissed petitioner from a job which she had concededly performed with complete competence for 8 years solely because she could not meet a newly implemented requirement that any person holding her job must have a Bachelor of Science degree?

Statutory Provision Involved

Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2) as amended, provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Statement of the Case

Petitioner is a 44-year old black woman who was fired by respondents[1] after eight years of exemplary job performance because she did not possess a college degree, an eligibility requirement imposed some years after she began

[1] The respondents are Nassau County Medical Center; Doctor Donald H. Eisenberg, Superintendent; Nassau County Civil Service Commission; Gabrial Kahn, Chairman; Edward Witanowski, Edward A. Simmons, Adele Leonard, Executive Director of Nassau County Civil Service Commission. Petitioner's claim against the state defendants was dismissed before trial.

her employment. Petitioner commenced this suit alleging that respondents had discriminated against her on the basis of race in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended. Petitioner claimed, and the United States District Court found, that the requirement of formal college education had an unjustifiable racially disproportionate impact forbidden by Title VII. The Court of Appeals for the Second Circuit reversed the district court judgment on the grounds that petitioner failed to make out a *prima facie* case, notwithstanding unchallenged statistical proof that three times fewer blacks than whites in the area population could satisfy the challenged requirement. Such a holding is so directly in conflict with this Court's recent decision in *Dothard* v. *Rawlinson,* 97 S. Ct. 2720 (June 30, 1977), decided just three days before the court of appeals rendered its decision here, that summary reversal, or remand for reconsideration in light of *Dothard,* is warranted.[2]

Petitioner has been employed in the blood bank of Nassau County Medical Center since 1965. Her competence to perform the duties of Medical Technologist I is unquestioned: she is rated among the top employees in the blood bank and from 1967 served as assistant to the Supervisor. In 1970, she was appointed Acting Supervisor of the entire laboratory and served in that capacity for six months. Thereafter, petitioner trained and then served as assistant to the newly-appointed permanent supervisor until 1973,

[2] Petitioner promptly brought *Dothard* to the attention of the court of appeals in a timely petition for rehearing, but the petition was denied without comment.

when she was fired for want of formal education.[3] Before she was fired, petitioner trained new employees in the blood bank to perform the duties of a Medical Technologist I. These new employees, all of whom are white, now earn more than petitioner because they have had the required formal education.

Petitioner was officially given the title and pay of a Medical Technologist I in 1967 as a result of a Civil Service reclassification. As a result of the same reclassification, respondents imposed the requirement that all candidates for permanent appointment as Medical Technologists I possess a college degree or equivalent academic certification,[4] and that they take and pass the Civil Service Examination.[5]

[3] The record reveals that petitioner received an inferior education in segregated Florida and South Carolina Schools. See *Brown* v. *Board of Education,* 349 U.S. 294 (1954); *Gaston Co.* v. *U.S.,* 395 U.S. 289 (1969). "Her high school was apparently so poor that it was abandoned when integration was required . . ." p. 2a.

[4] Certification by the American Society for Clinical Pathologists (ASCP), is an alternative prerequisite. To obtain such certification, however, one must have a specified amount of laboratory training *and* have a college degree. Petitioner, although not a member of ASCP, trained students who would later get ASCP certification and permanent Medical Technologist I positions. Petitioner is certified by the International Association of Laboratory Technologists as a Registered Medical Technologist (RMT).

[5] An issue not presented in this case is respondents' use of a written examination, in addition to the college degree requirement, for qualification as a permanent Medical Technologist I. The examination tested not only knowledge of blood banking techniques relevant to the job at issue, but skills used in ten other laboratories involving very different methods and lab equipment: hematology, histology, virology, chemistry, serology, bacteriology, immunohemotology, electrophoresis, microbiology, and parisitology. This Court has already held "a test may be used in jobs other than those for which it has been professionally validated only if there are 'no significant differences' between the studied and unstudied

An examination for permanent classification was given in April, 1973, but respondents denied petitioner permission to take the examination because she did not fulfill the formal academic requirements. In December, 1973, petitioner was fired as a result of the promulgation of a Medical Technologist I eligibles list based on the April, 1973 examination. Three months later she was rehired, and given the same duties, but at a lower-paying Laboratory Technician II classification. Before she was fired, petitioner was the *only* black Medical Technologist I in the blood bank, which has approximately fifteen workers; at the time of trial, there were *no* black Medical Technologists I.[6]

Guided by the approach in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the district court, using local and state census statistics introduced by petitioner, found that the college requirement operated to exclude blacks from employment at a rate three times greater than whites, and held that petitioner had made out a *prima facie* case under Title VII. The district court also concluded respondents produced no evidence that the challenged degree require-

jobs." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 432 (1975). Pursuant to a "grandfather" provision, petitioner was able to take the examination only once. She did not pass, but was continued for two more years. If she had had a college degree, she would be permitted to take the examination repeatedly without being either fired or demoted. Thus, it is the degree which bars petitioner's path. Inasmuch as petitioner was not fired because she has not passed the examination, its validity, while not conceded, is not yet ripe for determination.

[6] The only other black in the blood bank is Frank Appelwaithe, a male with not one but two college degrees. Mr. Appelwaithe was hired as permanent supervisor in 1970 to fill the vacancy left by George Davis, a white who had no college degree. Mr. Appelwaithe is a Medical Technologist III.

ment was related in any way to petitioner's ability to perform the job.[7]

The district court found that in denying petitioner permission to take the 1973 examination because she was not "properly" educated,[8] and thereafter demoting her to a lower paying position, respondents violated Title VII; the court ordered petitioner reinstated as a provisional Medical Technologist I, enjoined respondents from disqualifying petitioner from taking future civil service examinations because she does not have a college degree, and awarded back pay and attorneys fees.

On June 30, 1977,[9] the court of appeals reversed the judgment with directions to dismiss the complaint on the

[7] Nor can respondents now argue that the degree requirement is job related. In a memorandum to respondent Medical Center dated August 8, 1977, respondent Civil Service Commission obstensibly abolished the college degree requirement in recognition of the "criticism that the Bachelor's Degree in Science did not provide adequate nor [sic] appropriate laboratory training." In reality, however, since ASCP certification is still required and is currently granted only to individuals with college degrees, the degree requirement remains in effect. See note 4, *supra*.

[8] On-the-job training rather than formal education is what is essential to successful work in the blood bank. One witness, who had a college degree and ASCP certification, testified that she learned everything she knew about blood banking from petitioner. Although the Medical Technologist I title is used throughout the Medical Center, the evidence established that once a person is trained in a particular laboratory, he is not thereafter transferred. Job specifications for Medical Technologist I do not require experience, while those for Medical Technologist II require two years experience *in the field of specialization*, indicating that vertical rather than horizontal movement within the Medical Center is what is contemplated.

[9] Upon respondents' initial appeal, the Second Circuit, on June 21, 1976, vacated the district court judgment for the plaintiff and remanded for reconsideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976). On remand, the district court confirmed its original judgment, and respondents again appealed.

ground that petitioner failed to establish a *prima facie* case. The court of appeals held that evidence demonstrating that the college degree requirement excluded almost three times as many blacks as whites in the adult population, was not sufficient to establish adverse racial impact. Petitioner filed a motion for rehearing in light of *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 27, 1977). The petition was denied without opinion.

Reasons for Granting the Writ

The court of appeals held that unrebutted census statistics showing that a job requirement disqualifies a disproportionate number of minorities in the adult population are insufficient to establish a *prima facie* case of discriminatory impact under Title VII. The Second Circuit ruled, at the urging of respondents,[10] that plaintiff had failed to make out a *prima facie* case because "statistical evidence concerning only the general population is [not] sufficient to demonstrate that a job prerequisite 'operates to exclude' minorities." p. 29a. This is precisely the argument rejected by this Court in *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 30, 1977).

> The appellants argue that a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a *prima facie* case. . . . There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants.

97 S. Ct. at 2727. In *Dothard*, this Court upheld the use of census data to prove the discriminatory impact of the defendant's height-weight job requirement. 97 S. Ct. at 2727, n. 12. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430, n. 6 (1971), this Court expressly relied on census data showing the disproportionate impact of Duke Power's high school degree requirement on adults in North Carolina. Because *Dothard* was decided only three days before the panel decision in the instant case, however, the court of appeals could not as a practical matter have been aware of it when its decision was written. Under these circumstances, it would clearly be appropriate to summarily reverse the decision below or to vacate and remand for reconsideration in light of *Dothard*.

The decision of the Second Circuit holding irrelevant evidence that a job requirement precludes a disproportionate segment of the black adult population is squarely in conflict with the decisions of the three other circuits. See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 918 (5th Cir. 1973); *Johnson* v. *Goodyear Tire and Rubber*, 491 F. 2d 1364, 1371 (5th Cir. 1974); *Green* v. *Missouri Pacific Railroad Co.*, 523 F. 2d 1290, 1293-95, *rehearing den.* 523 F. 2d 1299 (8th Cir. 1975); *Boyd* v. *Ozark Airlines, Inc.*, 15 EPD ¶ 7863, pp. 6283, 6285, n. 1 (8th Cir. 1977); *Gregory* v. *Litton Systems*, 472 F. 2d 631 (9th Cir. 1972), aff'g 316 F. Supp. 401, 403 (C.D. Cal. 1970). In addition, the Equal Employment Opportunity Commission, conforming to this Court's decision in *Griggs*, has consistently held that the disparate impact of a job re-

[10] See, e.g., Brief for Nassau County Defendants-Appellants, No. 76-7522, pp. 6-7.

quirement can be measured by its effect on the general population.[11] Thus either the Commission will have to follow a different substantive rule in the Second Circuit than it applies in the rest of the country or its probable cause findings in cases arising in New York, Vermont and Connecticut will often be in direct conflict with federal law in that circuit.

The Second Circuit appears to have ruled that a job requirement has a discriminatory effect only if "virtually no blacks were *in fact* able to satisfy the challenged job qualification and obtain employment with the defendant." p. 29a, n. 6. If the Second Circuit's standard considers only evidence of the qualifying rate among actual job applicants, it is precisely the standard rejected by *Dothard*. It is also impossible to understand how this standard could result in judgment for defendant in this case, since *no* black applicant for the position petitioner held, Medical Technologist I at the blood bank, has ever satisfied the degree re-

[11] E.E.O.C. Opinions Nos. 77-9, 2 CCH Emp. Practices Guide ¶ 6564; 75-199, 2 CCH Emp. Practices Guide ¶ 6555; 75-115, 2 CCH Emp. Practices Guide ¶ 6533; 75-103, 2 CCH Emp. Practices Guide ¶ 6529; 75-047, 2 CCH Emp. Practices Guide ¶ 6441, p. 4176; 74-92, 2 CCH Emp. Practices Guide 6424; 74-90 2 CCH Emp. Practices Guide 6423; 74-89, 2 CCH Emp. Practices Guide ¶ 6418; 74-83, 2 CCH Emp. Practices Guide 6414; 74-53, 2 CCH Emp. Practices Guide ¶ 6410; 74-41, 2 CCH Emp. Practices Guide ¶ 6408, p. 4093; 74-34, 2 CCH Emp. Practices Guide ¶ 6407, p. 4089; 73-0499, 2 CCH Emp. Practices Guide ¶ 6402, p. 4079, 74-25, 2 CCH Emp. Practices Guide ¶ 6400, pp. 4071-72; 74-27, 2 CCH Emp. Practices Guide ¶ 6396; 74-08, 2 CCH Emp. Practices Guide ¶ 6390; 74-02, 2 CCH Emp. Practices Guide ¶ 6386, p. 4078; 72-0947, CCH E.E.O.C. Decisions (1973) ¶ 6357; 72-1497, CCH E.E.O.C. Decisions (1973) ¶ 6352; 72-1460, CCH E.E.O.C. Decisions (1973) ¶ 6341; 72-1395, CCH E.E.O.C. Decisions (1973) ¶ 6339, p. 4617, n. 2; 7200427 CCH E.E.O.C. Decisions (1973), ¶ 6312, 72-0284, CCH E.E.O.C. Decisions (1973) ¶ 6304; 71-2682, CCH E.E.O.C. Decisions (1973) ¶ 6288.

quirement, and no black held that position at time of trial."[12] If this suggested standard means that plaintiff must prove that "virtually no" blacks in the area population could meet the requirement, it finds no support in *Griggs*, *Dothard*, or *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The proportion of blacks (5.9%)[13] able to meet the medical center's job requirement was substantially lower than the proportion of women able to meet the height-weight requirement in *Dothard* (41%) or the proportion of blacks able to meet the high school degree requirement in *Griggs* (12%).[14] Title VII is concerned, not with the size of the minority qualifying rate, but with the disparity between the proportion of minorities and non-minorities able to qualify. In this case 16.9% of the whites, but only 5.9% of the blacks, could meet the degree requirement;[15] the white rate was 2.9 times as high as the black rate. In *Griggs*, the white and black rates were 34% and 12%, a ratio of only 2.8. See 401 U.S. at 430, n. 6. In *Dothard*, 99% of the men but only 59% of the women could meet the height-weight requirement, a ratio of 1.7. Thus the disparity in the proportion of minorities able to meet the job requirement in this case is even greater than the disparity in *Griggs* or *Dothard*.

This case is of particular importance because it reflects the reluctance of the Second Circuit to apply to white collar jobs in New York the construction of Title VII established by this Court in cases arising in Alabama[16] and North

[12] Joint Appendix, pp. 277-278A.

[13] Joint Appendix, p. 368A.

[14] See *Dothard* v. *Rawlinson*, 97 S. Ct. 2720, 2727, n. 12.

[15] Joint Appendix, p. 368A.

[16] *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 30, 1977).

Carolina.[17] That reluctance seems to arise in part from a misplaced reverence for higher education.[18] The court of appeals was unduly concerned at the prospect of requiring employers to justify a college degree requirement, p. 30a, despite the fact that such a requirement precludes hiring 94.1% of all adult blacks, and even though *Griggs* usually requires such a justification for a high school degree requirement which precludes hiring only 57.5% of all adult blacks.[19] The opinion below also reflects an inappropriate deference to Title VII defenses involving "advanced scientific method," "the fields of scientific knowledge," and "technology" pp. 30a-31a; but federal judges are as capable of evaluating the job-relatedness in these fields as the job relatedness of the requirements for the operation of coal-fired electric power plants,[20] or sophisticated multi-million dollar paper processing machinery,[21] or of a maximum-security prison,[22] and Title VII recognizes no exemption for such positions. Certiorari should be granted to make clear that Title VII requires the elimination for all jobs in all parts of the country, not merely blue collar jobs in regions

[17] *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[18] As this Court has noted, "History is filled with examples of men and women who rendered highly effective performance without conventional badges of accomplishments in terms of certificates, diplomas or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality." *Griggs* v. *Duke Power Co.*, 401 U.S. at 433.

[19] Statistical Abstract of the United States, 1976, p. 123.

[20] *Griggs* v. *Duke Power Co.*, 401 U.S. at 426-7.

[21] *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 427.

[22] *Dothard* v. *Rawlinson*, 97 S. Ct. at 2730.

with a history of deliberate discrimination, "of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U.S. at 431.

The particular facts of this case present circumstances of compelling injustice. In *Griggs*, *Albermarle*, and *Dothard*, the employer at least asserted a claim, ultimately rejected by the courts, that the plaintiff's inability to meet the disputed job requirement proved that he or she was incapable of performing the job. In this case, petitioner has in fact been doing the job for 12 years; the court of appeals noted that she had done "a satisfactory job," p. 33a, and respondents candidly conceded "[t]here is no doubt that appellee performs her work in the blood bank laboratory in a competent manner. She is highly regarded by the supervisor of the blood bank . . . "[23] Petitioner reached her position as a Medical Technologist I only after overcoming the special disadvantage of a segregated and inferior public school education prior to *Brown* v. *Board of Education*, 349 U.S. 294 (1954). To dismiss petitioner under these circumstances was as manifestly violative of the Fourteenth Amendment as dismissing her because she had brown eyes or was born under the wrong sign of the zodiac.

[23] Brief for Nassau County Defendants-Appellants, No. 76-7522, p. 3.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit. The decision of the Second Circuit should be summarily reversed; in the alternative, the judgment of the Second Circuit should be vacated and the case remanded for reconsideration in light of *Dothard* v. *Rawlinson*.

Respectfully submitted,

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APPENDIX

Opinion of District Court dated December 8, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 C 294

Margaret Townsend,

Plaintiff,

-against-

Nassau County Medical Center,

Dr. Donald H. Eisenberg, Superintendent,

et al,

Defendants.

MEMORANDUM AND ORDER

WEINSTEIN, D.J.

Plaintiff, a black female, has been employed in the blood bank of the Nassau County Medical Center, satisfactorily doing the work of a Medical Technologist I, since 1965. She brings this suit for reinstatement in that civil service classification. The defendant Nassau County Civil Service Commission has demoted her to a lower paying classification because she lacks a college degree or equivalent academic prerequisites, an eligibility requirement imposed some years after she began her employment. Her claim is that the qualification has an unjustifiable

racially discriminatory impact invalid under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e et seq.

Plaintiff's case is typical of that of many blacks. She attended school in a segregated Florida system. Her high school was apparently so poor that it was abandoned when integration was required and its records are not even available. The movement of many educationally deprived blacks from the South to this district created enormous and expensive burdens for our municipalities. Where, as in this case, a product of that discriminatory educational system has overcome her disadvantage by work experience, Title VII requires her actual job skills to be recognized.

Facts

On June 22, 1965, plaintiff was provisionally appointed to the position of Laboratory Technician at the Nassau County Medical Center. On January 6, 1967 she was provisionally appointed to the position of Senior Laboratory Technician.

Nassau County reclassified all its civil service positions effective July 7, 1967 pursuant to a job survey conducted by the firm of Cresap, McCormack and Paget. As a result, based on the work she had been doing, plaintiff was provisionally placed in a new, competitive position, Medical Technologist. She held this position until December, 1973.

During that period plaintiff also satisfactorily served in several administrative capacities. She was the assistant to supervisor George Davis, responsible for

the laboratory when Mr. Davis was not there. She also was responsible for teaching students blood-banking techniques, since she was one of the few people who had this expertise. Some of her former students are presently employed by Nassau County doing the same work she does, but receiving much higher salaries because they have a college degree and have taken and passed the necessary civil service examinations.

When Mr. Davis left the Medical Center, plaintiff was appointed Acting Supervisor. In addition to her technical duties, she was responsible for all the administrative functions of the supervisor, e.g., payroll, supplies, work schedules, and meetings. After approximately one year, a permanent supervisor was appointed. Plaintiff became his assistant.

In December, 1971, plaintiff was permitted to take the examination required for permanent classification as a Medical Technologist I. Although she did not pass that examination, she was continued provisionally in the position of Medical Technologist I because the eligible list promulgated as a result of the 1971 examination did not contain a sufficient number of names to fill all vacancies.

A second examination for Medical Technologist I was held in April, 1973. The plaintiff's application to take this examination was rejected by the Nassau County Civil Service Commission because she did not have the formal educational qualifications. Plaintiff was discharged in December of 1973 as a result of the promulgation of a Medical Technologist I eligible list based upon the 1973 examination.

Three months later she was rehired by the blood bank, again given the duties of a Medical Technologist I, but given the lower paying classification of Laboratory Technician II.

Although plaintiff's formal education was limited, her qualifications for her work in the blood bank have never been questioned. She began her training in November 1962 at the Hollywood Memorial Hospital in Florida where she studied for one year. She has now had more than ten years experience in blood banking at the Nassau County Medical Center. The testimony was clear that her activities covered the entire range of blood bank technology including typing of patients and donors, cross matching of patients, preparation of blood, covering in the donor room, taking blood, freezing blood, and all related clerical duties. She has routinely decided whether donors could safely give blood, and she has performed microscopic comparisons of blood samples. As already noted, for a period of five months, she served as Acting Supervisor for the entire blood bank, and she has trained many of the people who now work above her. Linda Schwaid, a permanent Medical Technologist I, for example, testified that plaintiff taught her everything she now knows about bloodbanking. Frank Appelwaithe, the present Supervisor, testified that he would rate the plaintiff among the top members of the department.

It is clear that there is no meaningful specialization of labor within the blood bank. The witnesses agreed that the press of the work requires each member to be familiar with and to perform all functions.

Thus, except for assuming added teaching and supervising duties, the plaintiff is presently doing as a Laboratory Technician II exactly what she had done and would do as a Medical Technologist I.

There is no evidence of bad faith in the defendants' reclassification of civil service jobs. The testimony of Albert Fontana, one of the personnel specialists involved in the reclassification survey at the Medical Center, established that a systematic effort was made to correlate job title with job content. It is apparent, however, that, notwithstanding the defendants' good intentions, an outstanding black employee has been frozen out of a position for which she has demonstrated eminent qualifications.

Law

The statutory basis for plaintiff's attack on job qualifications is Section 703 of Title VII of the Civil Rights Act of 1964 providing:

> "(a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000-e.

Interpreting this statute in Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971), the Supreme Court held that requirements which operate to disqualify blacks in disproportionate numbers violate the Act unless they can be shown to be related to successful job performance. Considering the validity of a high school diploma and general aptitude tests as job qualifications, the Court wrote:

> "Congress has now... required that the posture and condition of the jobseekers be taken into account....The Act proscribes not only overt

> discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

401 U.S. at 431, 91 S.Ct. at 853.

The Court rejected the view that an employer's intent is conclusive in determining whether a prima facie case of job discrimination has been established:

> "...good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability....Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

401 U.S. at 432, 91 S.Ct. 854 (Emphasis

in original.).

Under Griggs the plaintiff carries the initial burden of showing that a job qualification has a racially disproportionate impact. Once this prima facie case is made out, the burden shifts to the employer to prove "a manifest relationship to the employment in question." In Albermarle v. Moody, ___U.S.___,___, 95 S. Ct. 2362, 2375 (1975), the Court strengthened the position of the complaining party by ruling that he or she will prevail on a demonstration that alternative, non-discriminatory means exist which would accurately test the qualifications of employees. See, The Supreme Court, 1974 Term 89 Harv. L. Rev. 47, 228-229, n. 27 (1975). Cf. Boston Chapter NAACP, Inc. v. Beecher, 504 F. 2d 1017, 1019 (1st Cir. 1974); Vulcan Society v. Civil Service Commission, 490 F. 2d 387, 392 (2d Cir. 1973).

A. Prima Facie Discrimination

In support of her prima facie case, plaintiff offered data compiled by the Bureau of the Census for 1970. This statistical evidence demonstrates the extent to which a college degree requirement discriminates against blacks in New York State and Nassau County. In New York State 12.7% whites as compared to 4.2% blacks (males and females) age 25 years and older have completed 4 years of college or more. In Nassau County, 34.5% whites as compared to 12.4% blacks, age 25 years and older, have a college degree. These statistics are broken down to reveal sex differences

as well as racial distinctions. The total population of white males in Nassau County age 25 years and older is 370,219. 84,728 white males have four years of college or more. By contrast only 986 of a total population of 13,032 black males in Nassau County have achieved that level in education. The total population of white females in Nassau County age 25 years and older is 423,529. 50,036 white females have four or more years of college. But only 916 of 19,025 black females have achieved an equal educational status. The group with the lowest percentage of members holding a college degree in Nassau County is black females; only 4.7% of them have college degrees.

Statistical evidence of educational disparity in an appropriate geographical area is sufficient to establish the disproportionate racial impact of a degree requirement for Title VII purposes. In Griggs, North Carolina census statistics alone were relied upon by the Court for the proposition that a high school diploma requirement was racially discriminatory. 401 U.S. 424, 431, fn. 6, 91 S. Ct. 849, 853. Statistics on the completion of high school in the South and the Atlanta area were relied upon in United States v. Georgia Power Company, 474 F.2d 906, 918 (5th Cir. 1973) as sufficient evidence of discriminatory impact. See also, Johnson v. Goodyear Tire and Rubber Co. Synthetic Rubber Plant, 491 F. 2d 1361, 1371 (5th Cir. 1974) (census data on educational achievement of blacks and whites in Texas and Houston area).

In the present case, state and

county statistics demonstrate an approximately three times higher proportion of white as compared to black females who have attended four or more years of college. These statistics establish a prima facie case that a degree requirement has a disproportionate impact on blacks.

Comparable evidence as to the racial impact of the Medical Technologist I examination has not been presented. Because plaintiff was not dismissed for failure to pass that examination, it is not now before the court. Nothing said in this memorandum should be construed as touching on the validity of the examination under Title VII or any other theory since no evidence was adduced on this issue.

B. Failure to Show Job-Related Justification

The Equal Employment Opportunity Commission has approved three methods of validation to establish the requisite relationship between a qualification and job performance. EEOC Guidelines, 29 C.F.R. 1607. The Supreme Court in Albermarle, supra, stated that these guidelines are entitled to great deference.

> "The EEOC has issued 'Guidelines' for employers seeking to determine, through professional validation studies, whether their employment tests are job related. 29 CFR Part 1607 (1974). These Guidelines draw upon and make reference to professional

> standards of test validation established by the American Psychological Association. The EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency', and consequently they are 'entitled to great deference.' Griggs v. Duke Power Co., supra, 401 U.S., at 433-434, 91 S. Ct., at 854. See also Espinoza v. Fara Mfg. Co., 414 U.S. 86, 94, 94 S.Ct. 334, 339, 33 L.Ed. 2d 287. The message of these Guidelines is the same as that of the Griggs case -- that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' 29 CFR § 1607.4(c)."

___U.S. at___, 95 S.Ct. at 2378 (footnotes omitted).

Section 1607.2 of the Guidelines

provides that an educational requirement is to be treated as a test for purposes of determining its validity. Section 1607.5(a) discusses criterion, content, and construct validation, the three techniques which have been recognized by the EEOC:

> "(a) For the purpose of satisfying the requirements of this part, empirical evidence must be based on studies employing generally accepted procedures for determining criterion related validity such as those described in 'Standards for Education and Psychological Tests and Manuals' published by American Psychological Association.... Evidence of content or construct validity as defined in that publication, may also be appropriate where criterion validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analysis to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well developed tests that consist of suitable samples of the essential knowledge,

> skills or behaviors composing the job in question. The types of knowledge, skills or behavior contemplated here do not include those which can be acquired in the brief orientation to the job."

Criterion related validation -- the preferred method -- would require a showing that those who possess a degree perform better in the blood bank in terms of identifiable criteria, than those who do not. See Vulcan Society v. Civil Service Commission, 360 F. Supp. 1265, 1273 (S.D. N.Y.), affirmed in part and remanded with respect to issues not decided on the merits, 490 F. 2d 387 (2d Cir. 1973). No credible evidence has been submitted to support this proposition in this case. Mrs. Townsend, without a degree, is considered by her supervisor and others to be one of the outstanding members of the blood bank staff.

The second method, content validation, would entail proof that the aptitudes, skills, and training necessary to obtain a degree are equivalent to the skills and training required for successful performance in the blood bank. See Vulcan Society v. Civil Service Commission, 360 F. Supp 1265 at 1274. Construct validation would necessitate proof that the requirements for a degree accurately test for the general mental and psychological traits which are needed in the blood bank. See Vulcan

Society v. Civil Service Commission, 490 F. 2d 287 at 395.

The evidence submitted in this case does not support the proposition that an acceptable college program relates to the practical demands of the blood bank. As noted, Linda Schwaid, a Medical Technologist I, testified that she obtained all her training from the plaintiff. Moreover, under the Guidelines, content and construct validation may be used only upon a showing that criterion validation is not feasible. 29 C.F.R. § 1607.5(a) (1974); see also, The Supreme Court, 1974 Term 89 Harv. L. Rev. 47, 233 (1975). No such showing has been made here.

Defendants did not produce any credible testimonial or documentary evidence to demonstrate the validity of either the college degree or certification requirements for the position of Medical Technologist I pursuant to any of the accepted methods of validation. Witness Fontana indicated that no consideration was given to validating the degree qualification during the preparation of the Cresap survey. According to the testimony, the development of class specifications for each job at the Medical Center was based on responses to questionnaires distributed to employees and supervisors. The criteria relied on by the supervisors in making their recommendations is not known. See Albermarle Paper Company v. Moody, ___U.S.___,___, 95 S.Ct. 2362, 2379 (1975) (employer's validation study for aptitude tests fatally undermined by reliance on supervisorial rankings based on vague standards). The only other evidence

introduced to justify the inclusion of the college degree in the Medical Technologist I specifications showed that New York City requires a degree for a similar position and two federal bulletins recommend college education for medical technologists. This evidence is not sufficient to establish the validity of the degree requirement for the position of Medical Technologist I at the Nassau County Medical Center for this case in light of plaintiff's proven qualifications.

The court does not rule on the validity of the degree requirement except in the special circumstances of the case before it. Mr. Appelwaithe the supervisor did suggest that a college degree might be useful. In addition, Ms. Schwaid testified that her undergraduate education was helpful in enabling her to read the literature in the field. Although no direct evidence was presented on this point, a degree or its equivalent might guarantee that new applicants possess the skills and learning needed for successful training in the blood bank. This question would have to be explored in any future litigation. But, in any event, under Title VII an inherently discriminatory safeguard cannot be applied woodenly to deny job status to a current employee who has achieved all applicable learning and skills through practical experience.

This reasoning is understood by the District of Columbia Circuit's decision in Berger v. Board of Psychologist Examiners, ___F.2d___,No. 74-1047, 44 L.W. 2235 (D.C. Cir. Oct. 28, 1975), partially striking down a federal statute prescribing minimum

educational requirements for all psychologists practicing in the District of Columbia. The Court held that the Fifth Amendment Due Process Clause guarantees current practitioners an alternative means of demonstrating his or her professional qualifications as against a conclusive statutory presumption of incompetence. The Court's language reflects an appreciation of the value of practical experience. It wrote:

> "Possession of a graduate degree in psychology does not signify the absorption of a corpus of knowledge as does a medical, engineering, or law degree; rather it is simply a convenient line for legislatures to draw, on the brave assumption that whatever is taught in the varied graduate curricula of university psychology departments must make one a competent psychologist, or at least competent enough to be allowed to take a licensing examination. While it may not be irrational to assume that this academic background should in the future be a requisite to the practice of psychology, it is of questionable rationality to insist that current practitioners, who may have studied and practiced at a time when graduate courses in psychology were even less meaningful, are conclusively incapable of meeting today's new standards because they did not take those courses."

Slip Op. at 226.

The Court carefully distinguished the rights of current practitioners from those of future applicants.

> "Here the irrebuttable presumption of professional incompetence absent a graduate degree is not invalid with respect to future psychologists, but only with respect to current practitioners who have no meaningful grandfather rights....The inequity of the statute is that it fails to account for those competent psychologists who embarked upon their profession when no degree was required and who thus are denied a fair opportunity to come within the statute's licensing requirements at this point."

Slip Op. at 228.

If the right of a current, qualified practitioner to maintain his or her employment cannot be extinguished by statute, it follows, a fortiori, that such a result

may not be accomplished by regulations which conflict with statutory policies against racial discrimination.

Conclusion

Plaintiff must be reclassified as a provisional Medical Technologist I, retroactive to December 31, 1973, the date of her dismissal. Pursuant to 42 U.S.C. § 2000e-5(k), plaintiff is entitled to back pay in the amount she would have earned as a Medical Technologist I less what she actually earned during this period. In addition, plaintiff is entitled to take any future Civil Service examinations for permanent classification as a Medical Technologist I. Plaintiff is also entitled to attorney's fees. 42 U.S.C. § 2000e-5(k); Albermarle Paper Company v. Moody, ___U.S.___,___, 95 S. Ct. 2362, 2370 (1975).

Unless the parties stipulate with respect to back pay and fees, counsel for plaintiff shall submit an affidavit on the issue within ten days. Within twenty days defendants may either answer by affidavit or demand a hearing. Within thirty days, the parties shall submit a joint order or individual orders consistent with the court's determination. Agreement on the form of an order shall not constitute acquiescence in its validity or waiver of the right to appeal.

So ORDERED.

Dated: Brooklyn, New York
December 8, 1975.

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of June one thousand nine hundred and seventy-six

Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
HONORABLE ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

MARGARET TOWNSEND,
Plaintiff-Appellee,

-against-

NASSAU COUNTY MEDICAL CENTER, et al,

Defendants-Appellants.

No. 76-7003

Order of Court of Appeals dated June 21, 1976

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is vacated and the case is remanded for reconsideration in the light of Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), particularly Part III thereof.

/s/_____
HENRY J. FRIENDLY

/s/_____
WILFRED FEINBERG

/s/_____
ELLSWORTH A. VAN GRAAFEILAND

U.S.C.JJ.

Judgment of District Court dated September 27, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

75 C 294

MARGARET TOWNSEND,

Plaintiff,

-against-

NASSAU COUNTY MEDICAL CENTER,

DR. DONALD H. EISENBERG, Superintendent,

et al,

Defendant.

JUDGMENT

This matter having been remanded by the Court of Appeals for the Second Circuit by Order dated the 21st day of June, 1976 for reconsideration, and the matter having been set down for oral argument before this Court on the 24th day of September, 1976, the plaintiff having been represented by McEVILY, GRADESS & KLUEWER, by SUSAN KLUEWER and DONNA CLEAR, Legal Intern, Community Legal Assistance Corporation, and the defendants having been represented by JAMES M. CATTERSON, JR., County Attorney of Nassau County by JAMES N.

GALLAGHER, Deputy County Attorney, it is hereby

ORDERED, ADJUDGED AND DECREED that the original judgment in favor of plaintiff dated the 26th day of February, 1976 and heretofor entered on the 27th day of February, 1976 is in all respects confirmed for the reasons stated orally at the hearing. (JBW)

Dated: Brooklyn, New York
September 27, 1976

/s/ JACK B. WEINSTEIN
United States District
Court Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 827—September Term, 1976.

(Argued April 1, 1977 Decided June 30, 1977.)

Docket No. 76-7522

MARGARET TOWNSEND,

Plaintiff-Appellee,

—against—

NASSAU COUNTY MEDICAL CENTER; DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION; GABRIEL KOHN, CHAIRMAN; EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of NASSAU COUNTY CIVIL SERVICE COMMISSION; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

Before:

LUMBARD, MANSFIELD and GURFEIN,

Circuit Judges.

Appeal from a judgment and order of the United States District Court for the Eastern District of New York (Weinstein, *J.*) that defendants had violated Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and ordering that plaintiff employee be reinstated with back pay.

Reversed.

MATTHEW A. TEDONE, Deputy County Attorney, Mineola, N.Y. (Natale C. Tedone, Senior Deputy County Attorney, William S. Norden, Deputy County Attorney, and William Gitelman, County Attorney of Nassau County, Mineola, N.Y., of counsel), *for Defendants-Appellants.*

SUSAN KLUEWER, Community Legal Assistance Corp., Hempstead, N.Y. (McEvily & Kluewer, Hempstead, N.Y., of counsel), *for Plaintiff-Appellee.*

GURFEIN, *Circuit Judge:*

This individual Title VII action[1] is before us the second time.[2]

Appellee Margaret Townsend, a black female, began work on June 22, 1965 as a blood bank technician, at the Nassau County Medical Center, a county facility subject to the New York Civil Service Law. When Mrs. Townsend was appointed provisionally as a "Senior Laboratory Technician," that position required graduation from high

1 42 U.S.C. § 2000e *et seq.*

2 On June 21, 1976, this court by order vacated a judgment for the plaintiff entered in the United States District Court for the Eastern District of New York after a trial before the Hon. Jack B. Weinstein. We remanded the case "for reconsideration in the light of *Washington* v. *Davis* [426 U.S. 229 (1976)], particularly Part III thereof." On remand, Judge Weinstein confirmed his original order and the judgment for the plaintiff described below. The defendants now seek review of both judgments.

school, completion of an approved two-year course in medical technology, and two years experience as a technician in a medical laboratory or a satisfactory equivalent of a combination of training and experience. As a result of a survey conducted for the County by the firm of Cresap, McCormick and Paget, the County adopted a reclassification of all County positions subject to Civil Service effective July 7, 1967. Under the reclassification, Mrs. Townsend's job was designated "Medical Technologist I" and new prerequisites for appointment to a permanent position were established. It became necessary to pass a competitive examination which could be taken only by those holding either a bachelor of science degree or a certification by the American Society of Clinical Pathologists ("ASCP").[3] The County mitigated these new requirements, however, with a "grandfather clause" providing that incumbents who had served at least one year prior to July 7, 1967, in positions whose prerequisites were affected by the reclassification adopted by the County Civil Service Commission, would be permitted once to take the examination for his new title, regardless of the announced training and experience requirements, "but that for ensuing examinations it would be necessary for him as well as all other candidates to meet the qualification requirements of the test announcements."[4]

Appellee Townsend was accordingly permitted to take the examination given in 1971, although she had neither a college degree nor ASCP certification. Unfortunately, she failed to pass the examination. Another person in the same blood bank, also without the requisite academic

3 One of the requirements for ASCP certification was a B.S. degree.

4 Specifically, incumbents would be permitted to take the first examination administered *after* the promulgation of the "grandfather clause" on December 9, 1968.

qualification, passed it. Mrs. Townsend was, nevertheless, permitted to continue as a Medical Technologist I in a provisional status because the list of eligibles resulting from the 1971 examination was insufficient to fill all positions.

A second examination for Medical Technologist I was administered in April, 1973. In accordance with the limited "grandfather clause," Mrs. Townsend's application to take the examination was rejected by the Nassau County Civil Service Commission, because she lacked the formal educational qualifications. As a result of the promulgation of a Medical Technologist I eligible list based upon the 1973 examination, Mrs. Townsend was discharged in December of 1973. Three white incumbents were similarly discharged. *See* note 8, *infra*. Three months later appellee was rehired by the blood bank and given the duties of a Medical Technologist I. However, she was placed in the lower paying classification of a Laboratory Technician II. In short, Mrs. Townsend was, as the litigants and the District Court recognized, in effect demoted to a lower paying classification because she lacks the formal academic prerequisites to take future examinations which were imposed some years after she began her employment, and because she failed the "grace" examination.

Mrs. Townsend then brought suit for reinstatement with back pay, alleging that the requirement of either a B.S. degree or ASCP certification violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The essence of her Title VII theory is that the requirement of a B.S. degree or an ASCP certification has a disproportionate racial impact since far fewer blacks than whites in the general population have college degrees; and that the requirement violates Title VII because it is insufficiently job-related.

After a trial without a jury, the District Court held that appellee had established a *prima facie* case of discrimination and that appellants had not met their burden of justifying the academic prerequisites as job-related in their application to Mrs. Townsend. A distinction was perceived, however, between the rights of a person holding a job and a person seeking a job in the first instance. The District Court expressly disclaimed any intention to adjudicate generally whether these academic requirements were sufficiently job-related to be valid. Rather, it held that Title VII mandates that an employer must recognize the *actual* demonstrated job skills of a minority employee whether those skills are acquired through practical experience or through formal training. The court ruled that the educational requirements could not be applied so as to exclude a black employee "from a position for which she has demonstrated eminent qualifications."

In finding that the academic prerequisites were "inherently discriminatory"—*i.e.*, in finding a *prima facie* case of discrimination—Judge Weinstein recognized that the defendants had acted in good faith and with good intentions. Nevertheless, he observed that a job requirement violates Title VII if it has a racially disproportionate impact. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Noting that, in the general populations of Nassau County and New York State, proportionately far more whites have college degrees than do blacks—and especially female blacks—Judge Weinstein concluded that this statistical evidence of educational disparity was itself enough to establish the disproportionate racial impact of a degree requirement.

Having concluded that "a college degree requirement discriminates against blacks in New York State and Nassau County," Judge Weinstein next considered whether

appellants had shown that this requirement was job-related. *See Griggs, supra; Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). He found no evidence indicating that persons with college degrees perform better as medical technologists than those who do not. The District Court concluded that since the plaintiff had demonstrated her actual job qualifications by on-the-job performance, a college degree could not be required as a prerequisite to employment *in her case*. The court limited its ruling on the validity of the degree requirement, however, to "the special circumstances of the case before us." In short, the ruling of the District Court amounted to an *ad hoc* determination that Mrs. Townsend, by virtue of her demonstrable skill in the blood bank, was entitled to take another examination, and to retain her provisional status, without any time limitation, despite the existence of an unfilled eligible list.

The District Court, accordingly, ordered that: (1) plaintiff Townsend be reclassified as a provisional Medical Technologist I retroactive to December 31, 1973; (2) plaintiff be awarded back-pay for 1974 and 1975; and (3) plaintiff not be disqualified from taking future civil service examinations for permanent classification as Medical Technologist I by reason of her not having a college degree or certification by ASCP. The court made no provision for how long the plaintiff could remain in provisional status without passing an examination.

Mrs. Townsend can gain redress in the federal court only if she has suffered discrimination—either intentional or "objective"—because of her race or sex, or upon the ground that substantive due process protects incumbent job-holders from standards for permanent qualification created only after years of satisfactory service on the job.

We agree with the Nassau County defendants that appellee did not prove a *prima facie* case of racial discrimination against herself under Title VII and that she was not denied any "substantive due process" right.

As far as the *prima facie* case of discrimination is concerned, appellee adduced no evidence whatsoever of intentional discrimination, past or present, either by the County or by the Medical Center. It is well-established, however, that a *prima facie* case may be made through evidence that an employment test or qualification has as a consequence "an exclusionary effect on minority applicants." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803 n.14 (1973). *See Washington* v. *Davis*, 426 U.S. 229, 252 (1976). Even as far as adverse racial impact is concerned, however, the only evidence offered by appellee were 1970 census statistics showing that in Nassau County college degrees are held by only 12.4% of blacks age 25 years or over, as opposed to 34.5% of whites, and by only 4.7% of black females, as opposed to 11.8% of white females.[5] There were no statistics for the B.S. degree in particular.

Neither *Griggs, supra*, nor *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1361 (5th Cir. 1974), or *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), relied upon by appellee, support the proposition that statistical evidence concerning only the general population is sufficient to demonstrate that a job prerequisite "operates to exclude" minorities. In all of these cases plaintiffs established that virtually no blacks were *in fact* able to satisfy the challenged job qualification and obtain employment with the defendant.[6]

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5 Similar statistics concerning the population of New York State as a whole were also submitted into evidence.

6 It is true that in *Griggs*, as well as *Georgia Power*, and *Goodyear Tire & Rubber Co.*, the courts noted that the educational requirements at issue were satisfied only by a disproportionately low number of blacks. *See* 401 U.S. at 430 n.6; 491 F.2d at 1371; 474 F.2d at 918. But these statistics concerning the general population were relevant,

If we were to hold that a bare census statistic concerning the number of blacks in the *general population* who have college degrees could establish a *prima facie* case of discrimination, every employer with a college degree requirement would have the burden of justifying the degree requirement as job-related. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The burden of showing job-relatedness cast upon the employer does not arise until due discriminatory *effect* has been shown. *General Electric Co.* v. *Gilbert*, —— U.S. ——, 97 S. Ct. 401, 408-09, 45 U.S.L.W. 4031 at 4034 n.14 (Dec. 7, 1976). "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). We do not believe that a statistic relating only to the general population, and not to the employment practices of the particular defendant, should be sufficient to raise such a presumption against a college degree requirement. The requirement of a college degree, particularly in the sciences, seems to be in the modern day of advanced scientific method, a neutral requirement for the protection of the public. No doubt such a requirement could serve as a pretext for racial or sex discrimination, but this consequence should not be assumed. There will be time, if a showing of racial impact is made, for the comparison of the requirement of a degree in medicine, law, engineering or other professions with such a requirement for a laboratory technologist who is required by her Civil Service Title to be skillful in clinical chemistry, microbiology, blood-banking, serology, and hematology in more than one laboratory.

not to establish the prima facie case of discrimination which had already been made, but to demonstrate that the racially disparate impact on defendant employer's workforce which was *otherwise* established, was *due to* the challenged job requirement, and not to some other practice of the employer or other cause.

The relative function of the academic prerequisites to job-relatedness varies inversely with the risk to the health and safety of the public who depend upon the technology. *See Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (college degree for flight officer held job-related); *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859, 862 (7th Cir. 1974); 29 C.F.R. 1607.5(c)(2)(iii): ". . . a relatively low relationship may prove useful when the [economic and human] risks are relatively high." The issue will be whether a B.S. degree is substantially related to job performance. *Cf. Griggs, supra,* 401 U.S. at 431. But the fields of scientific knowledge are too disparate, and cover too many disciplines, for the mere existence of general college degree statistics in the general population, without more, to sustain a presumption of racial discrimination.

In refusing to adjudicate whether the college degree requirement discriminated against blacks in general, including potential future applicants, the District Court itself recognized that the adoption of a college degree requirement cannot, merely because of the general racial composition of college graduates, be considered discriminatory. Judge Weinstein noted that "although no direct evidence was presented on this point, a degree or its equivalent might guarantee that new applicants possess the skills and learning needed for successful training in the blood bank. This question would have to be explored in any future litigation."[7]

It was precisely because the District Court was unwilling to hold that the requirement of a B.S. degree, neutral on its face, makes out a *per se* violation, that the District Court had to award relief to Mrs. Townsend on an *ad hoc* basis.

7 The District Court credited the testimony of Mr. Applewhaite, the supervisor, "that a college degree might be useful."

Unfortunately, we see no legal ground for such *ad hoc* relief. Surely, if we restrict our consideration to Mrs. Townsend individually, no inference of racial discrimination against her alone is possible, *cf. McDonnell Douglas* v. *Green, supra.* When the new job qualifications were promulgated she was "grandfathered" into one examination despite her acknowledged lack of the threshold prerequisite academic standing. Although she failed this examination, there is no claim—nor was evidence adduced—that the examination violated Title VII. Indeed, at least one incumbent afforded the opportunity to take the "grandfather" exam, passed it. And of the four incumbents who, like Mrs. Townsend, were demoted for failure to satisfy the new job requirements, three were white.[8] In short, the newly promulgated prerequisites, neutral on their face, were applied to each employee at the blood bank in a uniform and racially neutral manner.

Similarly, we see no basis for awarding *ad hoc* relief to Mrs. Townsend under a "substantive due process" theory. It might be argued that, wholly apart from racial implications, a state employee—even a provisional one—is entitled to some sort of due process protection against the subsequent promulgation of more stringent civil service requirements. A panel of the District of Columbia Circuit has held that, in the absence of a "grandfather clause," the promulgation of a degree requirement for licensure as a psychologist is an impermissible "irrebuttable presumption" that psychologists who have practiced for many years without benefit of academic degree are incompetent. *Berger* v. *Board of Psychologist Examiners,* 521 F.2d 1056 (D.C.

8 These people, according to a sworn affidavit on the motion for a preliminary injunction of Ronald J. Levinson, Deputy Executive Director of the Nassau County Civil Service Commission, were Frederick Miller, Jean Wilson and Jean Bush, all white persons. The affidavit was not controverted on the motion.

Cir. 1975). We need not consider, however, whether the status of a provisional Civil Service employee is distinguishable from that of an individual practitioner, in terms of an alleged "vested right" protected by due process. *Cf. Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Russell* v. *Hodges,* 470 F.2d 212 (2d Cir. 1972). Nor need we consider whether the heavily criticized "irrebuttable presumption" theory of due process retains its vitality. *See Weinberger* v. *Salfi,* 422 U.S. 749 (1975): Note, *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 Harv. L. Rev. 1534 (1974). For Mrs. Townsend was not confronted with any *irrebuttable* presumption of incompetence. Under the terms of the "grandfather clause" she had a chance to rebut any such presumption by passing the examination which she was permitted to take in spite of her lack of academic credentials. Thus the only issue that remains is whether it was reasonable for the County, in its "grandfather clause," to limit its waiver of the academic requirement only to the extent of permitting an incumbent—white or black—to take one examination, rather than several. We cannot say that the choice made by the County to limit the waiver to one examination was irrational. *Cf. City of New Orleans* v. *Dukes,* 96 S. Ct. 2513 (1976) ("grandfather clause" limited by number of years pushcart vendor is in operation).

There is no doubt that Mrs. Townsend presents an appealing case, not because she is female or black, but because she has done a satisfactory job for several years and is now required to perform essentially the same duties for less pay than is given to some of her own former trainees who have qualified for permanent civil service positions. We can understand the desire of the District Court to redress an "inequity" by using its power to effect

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such redress. The question is whether Title VII authorizes the exercise of such an ameliorative function by a District Court in this way. We feel constrained to say that, on these facts, were the District Court judgment to stand, this hard case would make bad law. Bare figures on college degree distribution in the general population do not, in themselves, prove discrimination based on race, sex, or ethnic or national origin, in fields of scientific training in which risks to human life are involved. The black community has already made tremendous strides in achieving academic degrees, and, happily, there appears to be continuing, steady progress. In any event, should a college degree requirement ever be interposed as a prerequisite simply as a pretext for disqualifying members of the black community, the courts will be alert to deal with violations of Title VII. But we cannot say that this is such a case.

Reversed with directions to dismiss the complaint.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 24th day of August, one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD,
HON. WALTER R. MANSFIELD,
HON. MURRAY I. GURFEIN,

Circuit Judges.

MARGARET TOWNSEND,

Plaintiff-Appellee

v.

NASSAU COUNTY MEDICAL CENTER, DR. DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION, GABRIEL KOHN, etc.,

Defendants-Appellants

DOCKET NO. 76-7522

Order of Court of Appeals dated August 24, 1977

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellee

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO,
Clerk

/s/ By: SARA PIOVIA
Deputy Clerk